53627-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JOEL ZELLMER

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ON APPEAL FROM THE SUPERIOR OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge

APPELLANT'S REPLY BRIEF

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A. REPLY

1. THE DEPARTMENT'S RESPONSE TO THE FIRST REQUEST THAT IT HAD NO RECORDS WAS FALSE AND EQUITABLE TOLLING APPLIES TO THE FACTS PRESENTED HERE.

The Department of Labor and Industries ("L&I") argues that Mr. Zellmer's First Request is time barred, and that Zellmer cannot meet the predicates for equitable tolling of the statute of limitation period. Respondent's Brief at 19.

L&I bases its assertion by its claim that "[i]t was reasonable for the Department to rely on the 'IME' or 'independent medical examination' language in Zellmer's request to search for records only involving examinations of that type"; and alleges that its reliance on only that language is not bad faith or deception. Id. at 20. L&I's argument fails.

Contrary to L&I's claim, its sole focus on the single term "IME" to the exclusion of **all other descriptors** given by Zellmer is not "an attempt to provide" records to Mr. Zellmer. Id. at 20. It is a violation of the PRA.

In response to his First Request, L&I claimed that it had no records, CP 54 (close-out letter), when in fact it did. The billing and payment records related to each of the four doctors were later provided by L&I to Zellmer's Fourth Request and in conjunction with L&I's summary judgment motion. CP 79-94 (billing records), CP 119-144 (payment records); compare with CP 49, and CP 60 (later Second Request giving specific payment amounts of records sought).

As already demonstrated, L&I unlawfully withheld the existence of the billing and payment records by repeatedly claiming they had no records related to the four doctors. CP 54 (first request), CP 72 (second request), CP 43 (third request). However L&I did in fact possess those records at the time of each of Zellmer's three requests. CP 79-94, 119-144.

Instead of producing the records though, L&I deceptively told Zellmer they had searched their files and could find no records. Yet, no actual search for the requested records took place. CP 54, 240, 248.

Likewise, L&I falsely assured Zellmer that there were "no records responsive based on the information provided in the request", CP 54, when in fact Zellmer had provided all the information necessary for L&I to find the records. CP 49 (providing three claim numbers, the names of four doctors, and described the types of records he sought to include billings, statements, invoices, and warrant of payments). See CP 188-89, 237-38 (testimony indicating only the claim number and name of doctor was needed to locate billing and payment records).

Further, L&I exhibited overall bad faith by failing to strictly adhere to the procedural mandates in the Public Records Act (PRA) to liberally construe his request and provide full public access to public records. RCW 42.56.030, .070(1), .100.

As already shown, Mr. Zellmer's request was for plainly "identifiable records." RCW 42.56.080(1). The amount of

descriptive information was sufficient. The fact that L&I ignored most of the descriptors given in the request, failed to follow the PRA's mandates, and refused to follow obvious leads as they were uncovered, should not preclude the application of equitable tolling to the facts of this case.

Mr. Zellmer has been diligent in his efforts to obtain the sought-after billing and payment records of the four doctors; and after learning that L&I did in fact possess records responsive to his requests, see CP 119-144, he promptly filed suit--which directly precipitated the further disclosure and production of the silently withheld billing records of each of the four doctors in the very same amounts provided by Zellmer by his Second Request. See CP 79-94; compare CP 60.

Having met the predicates of bad faith, deception, or false assurances, and the exercise of due diligence for equitable tolling of his First Request, the doctrine should be applied here. Millay v. Cam, 135 Wn.2d 193, 205-06, 955 P.2d 791 (1998).

2. THE REQUESTED BILLING AND PAYMENT RECORDS OF EACH OF THE FOUR DOCTORS EXISTED IN L&I'S FILES AT THE TIME THAT EACH OF THE THREE REQUESTS WERE MADE.

L&I has expended tremendous effort to convince the trial court, and now this Court, that no records responsive to Mr. Zellmer's three requests exist. Thus, no violation of the PRA has occurred. L&I rests comfortably in the fact that none of the doctors performed "IME"s, and claims those were the only

records that Zellmer had requested. CP 23-37 (summary judgment motion), CP 38-102 (declarations supporting summary judgment); Respondent's Brief at 16, 20-47.

But, Mr. Zellmer did not ask for "IME" records. L&I unreasonably misinterpreted his request as being only for records of an "IME" if one had been performed. L&I does not keep "IME" records; but it does, however, keep billing and payment records of medical providers who have provided a billable service for L&I, including for IME services.

That Mr. Zellmer **mistakenly** thought that each of the four doctors had performed an "IME" in his three claims is not fatal to the responsiveness of the billing and payment records held by L&I; nor is it license for L&I to ignore its duty under the PRA to follow obvious leads when they are uncovered when searching for responsive records, or to communicate with Zellmer. See Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011) (agency required to "make more than a perfunctory search and to follow obvious leads as they are uncovered"); RCW 42.56.520(3) (agency has duty to communicate with requester and provide records).

L&I unreasonably excluded all other record identifiers given by Zellmer, focusing only on the service performed. That was unjustifiable in light of the fact that Zellmer plainly sought billing and payment records of the four doctors. CP 49 (first request), CP 60 (second request), CP 103.

L&I makes several erroneous arguments. One such example is its apparent claim that no records exist because it reasonably relied on Zellmer's "specific language to conduct a specific search for specific records", Respondent's Brief at 23, and that when Mr. Zellmer omitted the "IME qualifier" from his Fourth Request he received "non-IME" records which--as L&I alleges--were opposed to what he requested by his three earlier requests. Id. at 24.

The fallacy of that argument, i.e., that no records existed, is inherently obvious when you compare Zellmer's first and second public record requests to L&I (CP 49 and CP 60) with the billing records produced post-suit (CP 80-84, 86-87, 89-91, 93-94) and the payment records produced to his Fourth Request (CP 119-144). The records produced match the descriptors given by Mr. Zellmer, that is, where he requested billings, invoices, statements, and warrants of payments; of the four doctors Fey, Berryman Edwards, Blue, and Stumpp; with the given payment amounts of $35,700, $3,850, $5,400, and $4,200, respectfully; in the three claim numbers N767257, Y154479, and Y480253.

L&I glosses over the distinction that Mr. Zellmer did not ask for IME records; rather, he asked for billing and related records for what he thought was an IME service by the four doctors. L&I cannot rationalize its repeated claim that the billing records produced along with Lori Rigney's declaration, CP 79-94, or the payment records produced to Zellmer's Fourth

Request, CP 119-144, are not responsive to any of Zellmer's requests because none of those four doctors billed L&I for an "IME". That claim is unsustainable in light of the simple fact that those billing records--as requested by Mr. Zellmer--appear **in the exact payment amounts** as given to L&I by Mr. Zellmer in his Second Request. CP 60. L&I's argument fails.

Mr. Zellmer identified the records he requested with reasonable clarity. RCW 42.56.080(1). And it was incumbent on L&I to perform a reasonable search to locate the records that Mr. Zellmer knew existed in L&I's files.

3. L&I FAILED TO PERFORM A REASONABLE SEARCH AND TO FOLLOW OBVIOUS LEADS AS THEY WERE UNCOVERED.

L&I argues that it "searched based on Zellmer's specific parameters in his request and found no responsive records." Respondent's Brief at 26. That is simply untrue.

L&I made no effort to search for the billing and payment records at all. Instead, it ignored every other descriptor given by Zellmer save the term "IME", and only "searched" a database to initially determine if any IMEs had been performed in his three claim numbers. Since none occurred, L&I assumed no billing or payment records existed. That was unreasonable.

An example of an unreasonable search by an agency when it focuses on only one search criteria or term was examined in the matter of Joel Zellmer v. King County, 2018 Wash.App. LEXIS 1630 (July 16, 2018), reported at 4 Wn.App.2d 1047, 2018 Wash.App.

LEXIS 1730 (2018). See CP 424-437.

In that case, Division One of this Court examined the reasonableness of the County's search for photographic records.

There, in a first request Mr. Zellmer had requested all photos of the inside of his home taken prior to service of a search warrant executed on December 6, 2005. After a search, the County produced 35 photos and closed the request. CP 426-27. Knowing the production was incomplete, he made a second request giving a date of December 7, 2005--the second day of the search. After another search, the County produced 24 more photos and closed the request. CP 428-29. After suit was filed, the County produced an additional 235 digital photos of the inside of his home which had different dates than those given by Zellmer; and upon review of the metadata for the 235 photos, the date "modified" and the date "created" was the same. CP 429. Zellmer's claims were dismissed on summary judgment, and Zellmer appealed. CP 430.

The appellate court reversed, finding the County used an unreliable search method which resulted in an inadequate search under the PRA. In so holding, the court acknowledged that the County's method for determining that a photo was responsive or not was by focusing on only one search criteria, that is, by the date, although Zellmer had given the County additional search criteria and descriptive information. CP 435. The court of appeals aptly stated:

> In sum, KCPAO knew or should have known that the methodology it used to parse responsive from non-responsive records was inherently unreliable. The KCPAO did not communicate with Zellmer to explain that it was unable to conclusively determine the dates on which the photographs were actually taken and ask how he wished to proceed. Zellmer therefore had no way of knowing that KCPAO had excluded many photographs of the inside of the home on an unreliable basis. This was not reasonable.

CP 435-36. Mr. Zellmer became the prevailing party. CP 436.

Here, L&I used a similar unreliable methodology: it focused only on the IME search term, instead of also relying on the other terms given by Zellmer (such as the type of records and payment amounts). It is analogous to the way that King County focused only on the dates given by Zellmer instead of the other descriptive information also provided in the requests--thereby excluding responsive records. Compare CP 434 ("it is apparent that the KCPAO simply assumed that the "Date modified" was the date the photographs were actually taken, even though there is evidence they should have known that this assumption was unwarranted.").

That same reasoning applies here because comparably, the L&I searchers incorrectly assumed no billing or payment records existed because no IME services were conducted in Zellmer's claims. So they refused to search any further. That no IMEs occurred did not make the billing and payment records cease to exist. They existed in spite of the one piece of (apparently) incorrect information Zellmer gave to L&I. Even so, L&I was

obligated to follow obvious leads during their so-called "search", which they failed to do in each of his three requests for the same billing and payment records.

In the brief of respondent, L&I makes several light-minded arguments devoid of logic. One such claim is that "Zellmer expects the Department to create new search parameters and search for records that he never requested", thereby "expand[ing] his request". Respondent's Brief at 33. The sophism is evident.

As an example, in his First Request, Zellmer asked for all "billing(s), invo[i]ces [and] statements", as well as "warrants of payments" for doctor "Steven G. Fey", and gave the claim number "Y154479". CP 49. In his Second Request, Zellmer gave the amount of payment made to doctor Fey of "$35,700.00". CP 60. At those times, L&I possessed a billing statement and related records from doctor Fey in claim number Y154479 in the amount of $35,700, see CP 80-84, and payment records for doctor Fey under that same claim number in that same amount, see CP 122, 127, 136-138. The records were, and are, squarely responsive to his requests. They were the very records he sought--repeatedly. CP 103, 106-108, 422-23. The same holds true for the records of the other three doctors.

Keeping in mind the PRA's "strongly worded mandate for broad disclosure of public records," Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978), and its requirement to

liberally construe requests, RCW 42.56.030, it is hard to fathom how L&I can rationally make the claim that the records they possessed (but never searched for) are not the records Mr. Zellmer requested, and further, that they do not exist. L&I's further claim that it conducted an adequate search when no search occurred is as equally fictitious as it is counterfeit. Overall, L&I's myriad violations of the PRA are undeniable.

B. CONCLUSION

It diligently took Zellmer four separate requests and a lawsuit to finally obtain the sought-after and requested billing and payment records from L&I that it should have located and produced to Zellmer in response to his First Request. L&I's failed responses, including its silent withholding of records, inadequate searches, and unlawful withholdings, among other things, led to its violations of the Public Records Act in each of Zellmer's three requests to L&I.

Mr. Zellmer respectfully requests that this Court reverse the order of the trial court dismissing Zellmer's claims and remand for further proceedings, and award him his reasonable costs and fees incurred on appeal.

DATED this 11 day of November, 2019.

Respectfully submitted,

Joel Zellmer
Pro Se

CERTIFICATE OF SERVICE

(Pursuant to GR 3.1)

I, Joel Zellmer, certify (or declare) that on the date below I deposited the foregoing APPELLANT'S REPLY BRIEF, in the internal Legal Mail system of Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 pursuant to GR 3.1, and made arrangements for postage, addressed to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington this 11 day of November, 2019.

Joel M. Zellmer
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